No. 10,687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC. (a corporation),

Appellant,

vs.

JAMES R. BUNDESEN, HOWARD F. LAURITZEN, and BUNDESEN & LAURITZEN, a copartnership,

Appellees.

BRIEF FOR APPELLANT.

DARRAH & ELLIS,
GUARD C. DARRAH,
AGLER B. ELLIS,
Stockton Savings & Loan Bank Building, Stockton, California,
SINGLE, BRYANT, COOK AND HERRINGTON,
465 California Street, San Francisco, California,
Proctors for Appellant.

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VS.
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BRIEF FOR APPELLANT.

The appeal is by the libelant from a final decree of the District Court of the United States for the Northern District of California, Southern Division.

STATEMENT OF JURISDICTION.

The cause was in admiralty, and by the libel (Ap. 2-8) and amendment (Ap. 20-21) the libelant sought to recover damages because the respondents returned in a damaged condition (Ap. 5.) a commercial vessel of the United States, to wit, a derrick barge (Ap. 2-3) which they had chartered from the libelant (Ap.

3-4). The admiralty and maritime jurisdiction of the district court was alleged in the libel (Ap. 5), admitted in the answer (Ap. 26), and found true by the district court (Ap. 231). The district court therefore had jurisdiction of the libel. 28 U.S.C.A., sec. 41 (3). The final decree dismissing the libel was entered September 7, 1943. (Ap. 233-234.) Petition for allowance of appeal to this court and order allowing the appeal were filed December 6, 1943. (Ap. 235.) This court therefore has jurisdiction upon appeal to review the said decree under section 128 of the Judicial Code. 28 U.S.C.A., sec. 225.

STATEMENT OF THE CASE.

Libelant was a corporation (Ap. 2, 226) and the owner of the derrick barge "Foy No. 2" (Ap. 2-3). The barge was without motive power, but the equipment thereon was operated by steam. Respondents Bundesen and Lauritzen were copartners and general contractors. (Ap. 226.) In May, 1941, they were constructing an outfall sewer for the United States Navy on the Napa River, near Vallejo, California. (Ap. 226.) In connection with such work they chartered the "Foy No. 2" from libelant. (Ap. 226.) The contract between the parties was oral and informal. (Ap. 226.) According to the allegations of the libel the contract was a demise charter. (Ap. 3-4.) According to the allegations of the answer to the libel (Ap. 24-26), and the findings (Ap. 226-227) and conclusions of the court (Ap. 231), the contract was a time charter for the services of the barge.

The first question involved on the appeal, raised by the pleadings, the evidence, and the findings and conclusions of the court, is whether the contract between the parties was a demise charter or a time charter.

On May 15, 1941, the barge was towed from Oakland, California, to the said place of respondents' construction on the Napa River. (Ap. 227.) There it was operated on May 16, 19, and 20. (Ap. 228.) Early in the morning of May 21, 1941, while the fireman Adrian A. Westall was getting up steam in the boiler on said barge, a fire occurred (Ap. 228) and the barge was damaged.

In the first cause of action in the libel, it was alleged that under the demise charter respondents had custody and possession of the barge and controlled and directed the operation thereof and the operatives thereon (Ap. 4); that the barge had a value of $40,000 when delivered to respondents but had been damaged to the extent of $39,500 when returned by them to libelant (Ap. 4-5). In the second cause of action in the libel, it was alleged that the damage was ascribable to the negligence of the respondents. (Ap. 5-6.) The answer to the libel alleged (Ap. 29), and the court found it true (Ap. 228), that the barge was at all times in the possession of the libelant, and the operation, maintenance, and care thereof was at all times under the exclusive control and management of the libelant. The answer also denied the allegations of negligence (Ap. 27), and the court found in favor of the denials (Ap. 229).

The second question involved on the appeal, raised by the pleadings, the evidence, and the findings, is whether respondents were responsible for the damage to the barge.

Several affirmative defenses were raised by the answer to the libel. One of the affirmative defenses was that libelant warranted that the barge was seaworthy; that the warranty was breached; and that unseaworthiness of the equipment of the barge caused the fire. (Ap. 31-32.) The court inferentially found in favor of the defense. (Ap. 229.)

The third question involved on the appeal, raised by the pleadings, the evidence, and the findings, is whether breach of a warranty of seaworthiness caused the fire.

Another of the affirmative defenses was that libelant had waived any claim or cause of action for damages to said barge from fire or other cause, by accepting payment for the use of the barge. (Ap. 33.) The court inferentially found in favor of the defense. (Ap. 230.)

The fourth question involved on the appeal, raised by the pleadings, the evidence, and the findings is whether libelant waived its claim for damages.

A further affirmative defense was that libelant carried insurance inuring to the benefit of respondents, had received payment from the insurer for loss or damage to the barge, and was thereby estopped from claiming or recovering damages from respondents. (Ap. 30-31.) The findings of the court were

favorable to the defense. (Ap. 230.) The court also concluded that by reason of such insurance the libelant "assumed the risk of loss to said barge by fire". (Ap. 231.)

The fifth question involved on the appeal, raised by the pleadings, the evidence, and the findings and conclusions of law, is whether libelant is debarred from asserting a claim for damages against the respondents because it carried insurance and received payment from the insurer.

At the trial, the issue of damages was reserved pending determination by the court of the issue of liability. By its findings of fact and conclusions of law the issue of liability was determined against the libelant (Ap. 225-231); and a final decree was entered on September 7, 1943, decreeing that libelant take nothing and that the libel be dismissed (Ap. 223).

Under familiar principles the appeal being in admiralty the appellant is entitled to a trial de novo, respect, of course, being accorded to the findings of the district court. As the court will notice, part of the evidence before the district court consisted in the deposition of the fireman Adrian A. Westall who was alone on the barge at the time of the fire. (Ap. 43-76.) A written statement given by Westall the day after the fire was also admitted in evidence. (Ap. 210-212.)

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON.

Appellant relies upon its assigned errors Nos. 1 to 16, inclusive. (Ap. 236-239.)

ARGUMENT OF THE CASE.

A. SUMMARY.

The contract between libelant and respondents was a demise charter. It was binding although oral and informal. As charterers of the barge the respondents were charged with the duty of paying hire for the use of the barge. They were also charged with the duty of safeguarding the barge during the charter period. They had possession, control, and management of the barge, and direction and control over the operatives. When they returned the barge in a damaged condition, responsibility for the damage was prima facie established against them. The burden then rested on respondents to exonerate themselves from fault. They did not sustain that burden. If the fire which damaged the barge was proximately caused by negligence of the barge fireman, respondents were responsible under the doctrine of *respondeat superior*. The fire was not proximately caused by unseaworthiness of the barge or its equipment. Libelant did not waive its claim for damages by accepting payment for the use of the barge. Nor was libelant estopped from asserting a claim for damages by carrying and collecting insurance. The findings

of fact are contrary to the evidence. The conclusions of law are erroneous. Therefore, the judgment for respondents should be reversed.

B. POINTS OF LAW AND FACT.

1. THE CONTRACT BETWEEN THE PARTIES WAS A DEMISE CHARTER AND NEITHER THE FACTS NOR THE LAW WILL SUPPORT THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT TO THE CONTRARY.

This point is covered by assignments of error Nos. 1 (Ap. 236), 2 (Ap. 236), 3 (Ap. 236), 7 (Ap. 236-7), 8 (Ap. 237), 9 (Ap. 237), and 14 (Ap. 238). Each will be printed in full before the argument addressed to it.

(a) The derrick barge "Foy No. 2" was without motive power, and therefore the charter was a demise.

Assignment of Error No. 2. (Ap. 236.) The District Court erred in failing to find that the oral agreement between libelant and respondents entered into on May 14, 1941, was and constituted a demise of the Barge Foy No. 2 from libelant to respondents.

Assignment of Error No. 8. (Ap. 237.) The District Court erred in finding (III) that the oral agreement between libelant and respondents was for the services of the Foy No. 2; that libelant agreed to furnish and include an operator, fireman and full insurance for the Barge in the hourly charge therefor; that libelant agreed to keep the Barge fully insured.

Assignment of Error No. 14. (Ap. 238.) The District Court erred in its conclusion of law, No. III, in concluding that the oral contract between libelant and respondents was a contract for the services of, and was not a demise of, the Barge Foy No. 2.

The law is thoroughly settled that a charter of a barge without motive power is a demise, and this is true although the barge is accompanied by bargees paid by the owner.

United States v. Shea, 152 U.S. 178, 14 S. Ct. 519, 522-3, 38 L.Ed. 403.

The Independent, C.C.A.La. 1941, 122 F. 2d 141, 143.

Ira S. Bushey & Sons v. W. E. Hedger & Co., C.C.A.N.Y. 1930, 40 F. 2d 417, 418.

O'Boyle v. McGirr Bros., D.C.N.Y. 1930, 39 F. 2d 637, 638.

The Willie, C.C.A.N.Y. 1916, 231 F. 865, 867.

In *Ira S. Bushey & Sons v. W. E. Hedger & Co.,* 40 F. 2d 417, it was said, at page 418:

"Charters of barges without motive power, accompanied by a bargee paid by the owner, are demises. The Daniel Burns (D.C.) 52 F. 159; Monk v. Cornell Steamboat Co. (C.C.A.) 198 F. 472; The Willie (C.C.A.) 231 F. 865; Hastorf v. Long (C.C.A.) 239 F. 852; Warley v. Carroll (C.C.A.) 248 F. 466. * * * Both kinds are without motive power and are essentially subject to the control of the tugs which tow them. The agreements by which they are chartered are

demises. Legally such vessels are regarded as in the exclusive possession of the charterer."

The binding effect of a demise charter is not impaired by the fact, as in this case (Ap. 236), that it is informal or oral.

United States v. Cornell Steamboat Co., 267 U.S. 281, 285, 45 S.Ct. 239, 60 L.Ed. 613.

United States v. Shea, 152 U.S. 178, 14 S.Ct. 519, 522, 38 L.Ed. 403.

Under such demises the charterer is charged with the duty of paying the hire for the use of the vessel.

United States v. Shea, 152 U.S. 178, 14 C.Ct. 519, 522, 38 L.Ed. 403.

And under such demise the charterer is also charged with the duty of safeguarding the vessel.

The Moran No. 10, D.C.N.Y. 1924, 41 F. 2d 255, 256.

Ira S. Bushey & Sons v. W. E. Hedger & Co., C.C.A.N.Y. 1930, 40 F. 2d 417, 418.

As the barge "Foy No. 2" was without motive power, and, as the court found (Ap. 227), had to be towed to and from the place where respondents used it, it follows that the district court erred in failing to find that the charter was a demise, in finding that the charter was for the services of the barge (Ap. 227), and in concluding that the charter was not a demise (Ap. 231).

(b) The respondents had possession, control, and management of the barge.

Assignment of Error No. 1. (Ap. 236.) The District Court erred in failing to find that the actual possession, management and control of the Derrick Barge Foy No. 2 was in fact and with respondents at the time of the damage to the Barge on May 21, 1941.

Assignment of Error No. 7. (Ap. 236-237.) The District Court erred in finding (I) that the Derrick Barge Foy No. 2 was in the possession of libelant from May 15, 1941, to May 21, 1941, inclusive.

Assignment of Error No. 9. (Ap. 237.) The District Court erred in finding (IV) that after the Barge had been towed to the place of respondents' construction work, libelant informed respondents that libelant was unable to furnish an operator and fireman, and requested respondents to secure an operator and fireman to operate the Barge for libelant, and to deduct their wages from the hourly charge; that respondents did secure D.E.Williams and Adrian Westall to operate, and they did so operate, the Barge for and on behalf of libelant on May 16, 19, and 20, 1941; that on said days the barge was in the possession of libelant, and the operation, maintenance and care thereof was under the exclusive control and management of libelant.

The fact that the barge was without motive power should have prompted a finding that respondents had

possession, management, control, and care thereof at the time of the fire. The error of the court in finding to the contrary is therefore obvious as a matter of law. But the findings of the court in that respect were not only against law, but they were contrary to the evidence.

While the parties did not agree at the trial as to all the terms of the oral contract made over the telephone between Ed. M. Foy, on behalf of the libelant, and Howard F. Lauritzen, on behalf of the respondents, they did agree as to some of the terms. Thus there was no disagreement as to the rate of hire or how the rate was to be computed. Both Foy (Ap. 84-85) and Lauritzen (Ap. 170) testified that the rate was to be $80 a day, that is, $10 an hour, when the barge was in actual use by the respondents, and with a minimum of $40 whenever the barge was "fired up".

This agreement as to rate and computation of rate necessarily vested in respondents complete dominion over the barge. They alone had the power to say whether the barge would work or remain idle. They alone had the power to say where the barge would work and how long it would work. They alone had the power to say whether the operatives of the barge would or would not work, where they would work, and how long they would work.

That respondents were vested with complete dominion over the barge is further demonstrated by the acts and conduct of the parties under the charter. It appears from the record without dispute that

Robert Kitchen, construction superintendent for respondents (Ap. 197), directed when the barge was to leave for the construction job and where it was to be placed or moored at the job (Ap. 197-198). Without consulting libelant, he overhauled the barge equipment. (Ap. 202.) This consumed the time of six men for three hours. (Ap. 188.) Respondents paid libelant for use of the barge during the time thus consumed. (Ap. 93-94.) Respondents kept a foreman on board the barge "to tell the men what to do". (Ap. 214.) There were a number of other men on the barge besides the fireman and operator. (Ap. 215.) All were working for respondents. (Ap. 215.)

The evidence, in other words, is irreconcilable with a conclusion that libelant was in possession of the barge. The court erred in so finding. (Ap. 236, 237.) The inevitable finding should have been that respondents had possession, control, and management of the barge.

(c) The respondents had direction and control of the operatives of the barge.

Assignment of Error No. 3. (Ap. 236.) The District Court erred in failing to find that the fireman Adrian Westall was the servant and employee of the respondents, as fireman on the Barge on May 16, 19, 20 and 21, 1941.

Assignment of Error No. 9. (Ap. 237.) The District Court erred in finding (IV) that after the Barge had been towed to the place of re-

spondents' construction work, libelant informed respondents that libelant was unable to furnish an operator and fireman, and requested respondents to secure an operator and fireman to operate the Barge for libelant, and to deduct their wages from the hourly charge; that respondents did secure D. E. Williams and Adrian Westall to operate, and they did so operate, the Barge for and on behalf of libelant on May 16, 19, and 20, 1941; that on said days the Barge was in the possession of libelant, and the operation, maintenance and care thereof was under the exclusive control and management of libelant.

As pointed out in an earlier part of this brief, a charter of a barge without motive power, although accompanied by bargees, is a demise. Consequently, the fact that libelant secured the operative (Williams) and the fireman (Westall) would not be decisive in the present case.

When the record is examined, however, it becomes certain that respondents had the direction and control of both said operatives. Both, according to the record, were in the employ of respondents at the time the barge was moved to the construction job and both were transferred to the barge by respondents. (Ap. 172.)

Respondents did not produce operator Williams at the trial of the action nor did they produce fireman Westall. But the testimony of fireman Westall was taken by deposition at the instance of libelant.

(Ap. 42-77.) It was supplemented by a written statement which he gave on May 22, 1941, the day after the fire. (Ap. 210-212.) The testimony of Westall is disinterested and convincing. He said he was working for respondents at the time of the fire. (Ap. 43.) He said "they were my bosses". (Ap. 44.) He said they gave him instructions as to when to come and fire the boiler and when to quit. (Ap. 45.) He said they paid him. (Ap. 45.) He said they deducted Social Security from his pay. (Ap. 46.) There can be no escape from the testimony of fireman Westall; it demonstrates beyond any doubt that he was under the direction and control of respondents and nobody else at the time of the fire.

There is, therefore, no basis in the record for the finding of the court that Williams and Westall operated the barge for and on behalf of libelant. (Ap. 228.) It was error for the court to make such finding. It was likewise error for the court to fail to find that Westall was the servant and employee of respondents.

From the foregoing considerations it necessarily follows that the contract between the parties was a demise charter with all the legal consequences flowing therefrom.

2. RESPONDENTS WERE RESPONSIBLE FOR THE DAMAGE TO THE BARGE "FOY NO. 2" AND NEITHER THE FACTS NOR THE LAW WILL SUPPORT THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT TO THE CONTRARY.

This point is covered by assignments of error Nos. 3 (Ap. 236), 4 (Ap. 236), 5 (Ap. 236), 6 (Ap. 236), 10 (Ap. 237-238), and 12 (Ap. 238). Each will be printed in full before the argument addressed to it.

(a) When respondents returned the barge in a damaged condition, responsibility for the damage was prima facie established against them.

Assignment of Error No. 6. (Ap. 236.) The District Court erred in failing to enter a decree for libelant establishing respondents' liability for the damage to the Barge Foy No. 2.

The pertinent law is contained in *The Moran No. 10,* D.S.N.Y. 1924, 41 F. 2d 255, where it was said, at page 256:

> "The law on the subject is well settled. The charterer is liable for any damages to the boat resulting from his own negligence or the negligence of any one to whom he entrusts her. The burden of proving negligence is upon the owner, but he makes out a prima facie case if he can go no further than to show that the boat was damaged during the charter period and then the burden of explanation, or as it is sometimes said, of carrying on, lies upon the charterer. In the absence of exculpatory evidence, a presumption of negligence arises against him. (Cases cited.) This is the established law as to the obligation of the bailee in bailment for hire. (Cases cited.)"

The same principles were declared in *Ira S. Bushey & Sons v. W. E. Hedger & Co.,* C.C.A.N.Y. 1930, 40 F. 2d 417, where it was said, at page 418:

> "The agreements by which they are chartered are demises. Legally such vessels (barges without motive power) are regarded as in the exclusive possession of the charterer. In such a relation the charterer is only liable for negligence. But, when the barge is injured while in the exclusive possession of a bailee, the latter has the duty of going forward with evidence to explain the cause of the damage and to show that it was due to no lack of care on his part. (Cases cited.)"

Since, as later will be shown, the respondents did not sustain the burden of exonerating themselves from fault, it follows that the District Court erred in failing to enter a decree for libelant establishing respondents' liability for the damage to the Barge Foy No. 2.

(b) The fire which damaged the barge was proximately caused by negligence of the barge fireman, and respondents were responsible for his negligence under the doctrine of respondeat superior.

Assignment of Error No. 3. (Ap. 236.) The District Court erred in failing to find that the fireman Adrian Westall was the servant and employee of the respondents, as fireman on the Barge on May 16, 19, 20 and 21, 1941.

Assignment of Error No. 4. (Ap. 236.) The District Court erred in failing to find that the fireman Adrian Westall was negligent in starting

and operating the boiler on the Barge on May 21, 1941.

Assignment of Error No. 5. (Ap. 236.) The District Court erred in failing to find that the negligence of the fireman Adrian Westall resulted in the damage to the Barge.

Assignment of Error No. 10. (Ap. 237-238.) The District Court erred in finding (V) that on May 21, 1941, the fireman Adrian A. Westall got up steam in the usual and customary manner, in which he had been instructed by libelant; that the deck of the fireroom of the Barge was covered with oil; that an explosion in the firebox was due to and caused by the failure of the equipment of the Barge to function properly or by reason of defective fuel oil; that the damage to the barge was not caused by nor contributed to in whole or in part by any neglect or lack of care, or any improper act or failure to act on the part of fireman Westall, or of the respondents or any of them; that fireman Westall exercised proper care and acted prudently in endeavoring to fight and extinguish the fire; that fireman Westall was a competent, experienced fireman, and was not guilty of neglect or lack of proper care; that each and every allegation of negligence set forth in paragraphs XII and XIII of the libel herein is untrue.

Assignment of Error No. 12. (Ap. 238.) The District Court erred in its conclusion of law, No. I, and each and every part thereof.

Paragraphs XII and XIII of the libel, referred to in Assignment of Error No. 10 (Ap. 237-238), were as follows:

"XII. Libelant is informed and believes and thereupon alleges that respondents and each of them so carelessly and negligently used, cared for, and mishandled said barge 'Foy 2', and so failed to take proper care of said barge 'Foy 2' that therein and thereby said 'Foy 2' has been badly damaged by fire; that the reasonable cost of repairing said 'Foy 2' is the sum of $39,500.00, all to libelant's damage in the sum of $39,500.00." (Ap. 5.)

"XIII. Libelant is informed and believes, and thereupon alleges, that respondents were negligent in the aforesaid matters and things in the following particulars (among others which will be shown at the trial of this cause, and in which particulars libelant prays that this libel may be amended and supplemented):

(a) Starting a fire in the firebox without properly inspecting the condition thereof and also without leaving an attendant to watch said fire, but on the contrary in deliberately leaving said fire entirely unattended after starting the same.

(b) Thereafter, hearing a noise of a suspicious nature in the manner of the puff of a small explosion of fire, in not ascertaining the cause of said noise or fire, or sending any attendant to said noise immediately.

(c) In later taking improper measures to arrest and prevent the spread of said fire and particularly, entirely neglecting to use any fire extinguisher for said purpose.

(d) In not sufficiently manning said 'Foy 2' with careful, prudent and capable men and crew.

(e) In ordering or permitting the fire to be thus separated in said 'Foy 2' with only one employee aboard, and particularly when that one employee did not remain in constant attendance at the fire during such periods as lighting the fire.

(f) In failing to properly care for said 'Foy 2' and particularly to guard her against fire." (Ap. 5-6.)

Conclusion of Law No. I, referred to in Assignment of Error No. 12, was as follows:

"I. Libelant is not entitled to recover from respondents, or from any of them." (Ap. 231.)

The demonstration was earlier made that fireman Westall was the servant and employee of respondents at the time of the fire. The error of the court in finding the contrary has likewise been earlier demonstrated. Accordingly, Assignment of Error No. 3 need not again be discussed. If, therefore, fireman Westall was negligent and such negligence proximately caused the fire which damaged the barge, it is clear that respondents are liable under the doctrine of *respondeat superior.*

The questions here to be discussed are these: Was fireman Westall negligent, and did that negligence proximately cause the fire which damaged the barge?

Whatever else may be said, it is clear upon the present record that while fireman Westall was get-

ting up steam in the boiler room he negligently left the fire therein unattended and that his negligence in such respect proximately caused the damage to the barge. To that extent, therefore, the district court erred in its findings and conclusions.

The evidence on the subject is all one way. Westall who was alone on the barge at the time of the fire, testified in his deposition as follows:

> "Q. Now, tell us what happened on the 21st of May, 1941?
>
> A. Well, on the 21st day of May, 1941, I went up to fire the boiler, and had gotten up a reasonable amount of speed; I had got the firing well under way, and was subjected to a call to the toilet, and I left for four or five minutes, and when I come back it was well, I would call it, it must have been combustion fire that started the fire that burnt up the boiler." (Ap. 47.)

> "Q. Then go ahead and tell us just what happened?
>
> A. Well, after I had the air atomizing the fuel, and it looked like it was well taking care of itself, I stepped out at the stern end of the barge to go to the toilet, and on my way back I heard this explosion, and immediately I proceeded back to where it was, to see what had happened.
>
> Q. And what did you find?
>
> A. Well, I found that the deck in front of the fire box was on fire. And I immediately tried to extinguish the fire, looking around for something to put it out with, and I didn't find it. I used a pair of overalls and jumper that I had myself, to try to beat it out with." (Ap. 49.)

"Q. And it's better practice not to leave it while it is generating?

A. Yes, that's correct. Sometimes those things can't be avoided.

Q. You could have turned it off, couldn't you, before you left?

A. Well, I could have, I guess." (Ap. 55.)

"Q. At the time you went to the toilet, you were satisfied from the manner of operating that it was operating satisfactorily, weren't you?

A. Yes, sir.

Q. Now, at the time that you heard this explosion that you referred to, you were on your way back from the toilet, weren't you?

A. Yes.

Q. How far was the toilet from the fire box?

A. Well, I couldn't say just how far it was.

Q. Well, I don't mean exactly, but it's less than 30 feet, or 20 feet or so?

A. It's around 30 feet, I think, from the fire box.

Q. And when you heard the explosion, what did you do?

A. Well, I immediately went back to see what the trouble was. I went back to the fire box, to see what had happened.

Q. How long were you gone, Mr. Westall?

A. I had gone several minutes, anyhow. I don't know just how long it was." (Ap. 60.)

"Q. When you went around to the toilet, there was a big water tank that sits on there about eight feet high, and pretty nearly across the whole deck, and is between you and the fire box at that time, is that correct?

A. That's correct." (Ap. 73.)

There was introduced in evidence at the trial a Safety Order of the Industrial Accident Commission of the State of California. It reads:

> "No boiler while in active service shall be left unattended, regardless of whether or not it is equipped with automatic water feed regulator, fuel and damper regulators, high and low water alarm, or any form of automatic control. By 'active service' is meant that portion of time when the main stop valve is open and the fires are burning." (Ap. 176, 207.)

That Westall violated this Safety Order, is not susceptible to doubt. Nor is it susceptible to doubt that such violation was negligence. In answer to a hypothetical question covering the situation to which Westall testified, Thomas W. Smith, a chief engineer, said that due care was not used because the fireman did not stay close to the fire while generating steam. (Ap. 112-113.) Henry Foss, an operating engineer, gave similiar testimony. (Ap. 118-119.) When asked if it was good practice to leave the fireroom while steam was being generated, respondents' superintendent of construction Kitchen replied, *"Not as long as you are in sight of the stack and close enough or within sight"*. (Ap. 208-209.)

That such negligence on the part of Westall proximately caused the fire which damaged the barge, cannot be debated. The record therefore leads unerringly to the conclusion that the district court erred in finding that Westall was not the servant and employee of respondents, in finding that Westall was not negligent, in finding that negligence of Westall

did not proximately cause the fire, and in concluding that libelant was not entitled to recover from respondents.

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3. THE FIRE WHICH DAMAGED THE BARGE WAS NOT PROXIMATELY CAUSED BY UNSEAWORTHINESS OF THE BARGE OR ITS EQUIPMENT AND NEITHER THE FACTS NOR THE LAW WILL SUPPORT THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT TO THE CONTRARY.

Assignment of Error No. 10. (Ap. 237-238.) The District Court erred in finding (V) that on May 21, 1941, the fireman Adrian A. Westall got up steam in the usual and customary manner, in which he had been instructed by libelant; that the deck of the fireroom of the Barge was covered with oil; *that an explosion in the firebox was due to and caused by the failure of the equipment of the Barge to function properly or by reason of defective fuel oil;* that the damage to the barge was not caused by nor contributed to by any neglect or lack of care on the part of fireman Westall, or of the respondents or any of them; that fireman Westall exercised proper care and acted prudently in endeavoring to fight and extinguish the fire; that fireman Westall was a competent, experienced fireman, and was not guilty of neglect or lack of proper care; that each and every allegation in paragraphs XII and XIII of the libel herein is untrue." (Italics added.)

In their answer, the respondents asserted the defense "that the fire which caused said damage on May

21, 1941, was due to and caused by unseaworthiness of the equipment of said barge". (Ap. 31-32.) It is obvious that the district court did not make a direct finding according to the language of the defense. The italicized part of the above assignment has reference to a finding in the language of the assignment. (Ap. 229.) Possibly, respondents may regard such finding as an inferential finding sustaining their defense of unseaworthiness. *This court will notice, however, that the district court did not find what particular equipment of the barge failed to function properly or in what respect the fuel oil was defective.*

The presumption of seaworthiness arises in all cases of charter, and the burden of showing unseaworthiness is upon the one asserting it.

> *Seminole Lumber & Export Co. v. Bronx Barge Corp.,* D.C.Fla. 1926, 11 F. 2d 982, 983.

Seaworthiness does not require perfection in equipment. All that is required is reasonable fitness for the services designed or required.

> *The Indrapura,* C.C.A.Ore. 1911, 190 F. 711, 714.

In the case of a demise, the charterer takes *caveat emptor* as to defects which are open, if the charterer has had an opportunity to examine the vessel.

> *The Jungshoved,* D.C.N.Y. 1921, 272 F. 122, 124.

Here the respondents not only had full opportunity to examine the barge but they operated it for three days before the fire. They made no demands upon

the libelant for other or further equipment. This must be deemed a waiver of the lack of function or existence of defects, italicized in the above assignment.

Frank Waterhouse v. Rock Island Alaska Min. Co., C.C.A.Wash. 1899, 97 F. 466, 476.

Manifestly, the decree of the court cannot be sustained upon the theory that unseaworthiness of the equipment of the barge proximately caused the fire which damaged the barge.

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4. LIBELANT DID NOT WAIVE ITS CLAIM FOR DAMAGES BY ACCEPTING PAYMENT FOR THE USE OF THE BARGE AND NEITHER THE FACTS NOR THE LAW WILL SUPPORT THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT TO THE CONTRARY.

Assignment of Error No. 13. (Ap. 238.) The District Court erred in its conclusion of law, No. II, in concluding that the libel as amended should be dismissed.

Another defense asserted in the answer was that libelant had waived its claim for damages by accepting payment for the use of the barge. (Ap. 33.) Responsive to the defense, the district court made this finding:

> "VI. Shortly after the fire had occurred on said barge, libelant sent to respondents a bill dated May 21, 1941, for the services of the derrick barge on May 16, 19 and 20, 1941. Said bill contained a note stating: 'This statement does not

release your company from further liability or settlement in connection with loss due to fire.' Respondents promptly returned said bill to libelant with a letter dated May 29, 1941, in which respondents asserted that they had no liability by reason of said fire. Libelant took no exception and made no reply to said letter, but libelant did thereupon under date of May 31, 1941, send a bill to respondents for the services of said barge, as aforesaid, and omitted from said bill any claim or reservation of right to claim damages from respondents for injury to said barge. Respondents thereupon paid said bill dated May 31, 1941, and libelant accepted payment thereof." (Ap. 230.)

As pointed out in an earlier part of this brief the respondents as charterers of the barge were charged with the duty of paying the stipulated hire for its use.

United States v. Shea, 152 U.S. 178, 14 S.Ct. 519, 522, 28 L.Ed. 403.

Another, and wholly independent duty, with which they were charged as charterers of the barge, was to safeguard it or respond in damages.

The Moran No. 10, D.C.N.Y. 1924, 41 F. 2d 255, 256.

Ira S. Bushey & Sons v. W. E. Hedger & Co., C.C.A.N.Y. 1930, 40 F. 2d 417, 418.

There was no dispute between the parties as to the amount of the bill for the barge hire. When respondents paid that bill they merely discharged one of their duties. Logic will not permit it to be said that they

thereby discharged all other independent duties and particularly the duty to respond in damages if they did not safeguard the barge. Appellant does not conceive that this court will reach a contrary conclusion.

If, therefore, it be assumed that Conclusion of Law No. II that the action be dismissed (Ap. 231) is based upon an implied finding of waiver arising out of the facts recited in Finding No. VI (Ap. 230), it must inevitably follow that the said conclusion is not supported by the said finding.

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5. LIBELANT WAS NOT ESTOPPED FROM ASSERTING A CLAIM FOR DAMAGES BY CARRYING AND COLLECTING INSURANCE AND NEITHER THE FACTS NOR THE LAW WILL SUPPORT THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT TO THE CONTRARY.

Assignment of Error No. 8. (Ap. 237.) The District Court erred in finding (III) that the oral agreement between libelant and respondents was for the services of the Foy No. 2; that libelants agreed to furnish respondent the services of the Foy No. 2; *that libelant agreed to furnish and include* an operator, fireman and *full insurance for the Barge in the hourly charge therefor; that libelant agreed to keep the Barge fully insured.* (Italics added.)

Assignment of Error No. 15. (Ap. 238-239.) The District Court erred in its conclusion of law, No. IV, in concluding that libelant agreed to keep the Barge fully insured, and to include the cost thereof in the hourly charge for services, and

thereby assumed the risk of loss to the Barge by fire and other usual marine risks.

The defense was also asserted in the answer that libelant agreed "to keep said barge fully insured for the benefit of libelant and said respondents" (Ap. 30), and that because libelant carried and collected insurance it was "estopped to claim or recover any damages suffered by said barge as the result of said fire on May 21, 1941" (Ap. 31).

Responsive to this defense, the district court made Finding No. VII, as follows:

> "Libelant informed respondents at the time the oral agreement for the services of said barge was made that said barge was fully covered by insurance. Libelant did have and kept in force at all times herein mentioned policies of marine insurance on said barge in which said barge was insured and valued for the sum of $12,000.00 against loss or damage by fire and other specified perils. Libelant made claim upon the insurers for loss by reason of the fire occurring on said barge on May 21, 1941, and pursuant to such claim received payment from said insurers of the sum of $12,000.00." (Ap. 230.)

And responsive to the said finding, the court made Conclusion of Law No. IV, as follows:

> "Libelant by agreeing with respondents to keep said barge fully insured and to include the cost of insurance in the hourly charge for the services of the barge, assumed the risk of loss to said barge by fire and other usual marine risks." (Ap. 231.)

The burden of proof was on respondents to establish that the insurance was for their benefit.

The Turret Crown, C.C.A.N.Y. 1924, 297 F. 766, 780.

Kennelly v. Frederick Starr Contracting Co., C.C.A.N.Y. 1918, 250 F. 229, 230.

White v. Upper Hudson Stone Co., C.C.A.N.Y. 1917, 248 F. 893, 896.

Respondents did not sustain the said burden of proof. It is enough to quote from the testimony of Howard F. Lauritzen who contracted with Captain (Ed. M.) Foy for the use of the barge. He said:

"Q. How long have you known Captain Foy?

A. I don't know just how long I have known Captain Foy. I have known of the Foys for many years. I was born and raised on the river. Mr. Foy has been around there many years. * * *

Q. Do you know he is a little deaf?

A. Yes; I know he is a little deaf.

Q. This conversation you said you had with him, is it your statement that you, in effect, said exactly what you said in that letter; in other words, that you repeated back to Captain Foy that the rental was to include the operator and fireman and water, fuel, oil, and insurance?

A. That is right.

Q. In other words, you repeated that back over the phone to him?

A. That is right.

Q. Mr. Foy told you that they were insured, didn't he?

A. He said the equipment, the barge, was fully covered with insurance.

Q. And he said nothing about giving you any benefit of any insurance, did he?

A. He said that—when I repeated to him then about including the time per hour on the insurance—yes, he did, that it would include the insurance.

Q. He did not say you were to get the benefit of the insurance; what he said was, 'Yes, we have insurance protecting us'?

A. No; he said, 'The derrick barge is fully covered with insurance.' That, 'the derrick barge is fully covered.'

Q. Did he say 'we'?

A. I think he said, 'We were fully covered,' meaning him and the derrick barge.

Q. He didn't at any time say that you were protected by that insurance, Bundensen & Lauritzen had the benefit of that insurance; he never at any time said that, did he?

A. No; he did not say those words." (Ap. 183-184.)

Respondents' claim respecting insurance is destroyed by the foregoing testimony. The court did not make a direct finding that under the contract of the parties the insurance was for the benefit of respondents. The finding made was wholly inadequate as a substitute for a direct finding of that character. It was wholly inadequate, moreover, to support a conclusion of law that libelant by reason of insurance "assumed the risk of loss to said barge by fire". In reality, the finding made was meaningless: the conclusion of law a *non sequitur*. The authorities above cited make it certain that the carrying and collecting

of insurance by libelant conferred no rights upon respondents and constituted no defense to the libel.

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6. THE APPELLANT IS ENTITLED TO A TRIAL DE NOVO.

The appeal being in admiralty, the appellant is, of course, entitled to a trial *de novo.* In that connection it was recently said in *The Portaritisa,* C.C.A. Fla. 1942, 131 F. 2d 362, that it is the duty of an appellate court on such an appeal "to review the whole case and make such decree as ought to have been made." A case often cited on the subject is the decision of this court in *The Ernest H. Meyer,* C.C.A. Cal. 1936, 84 F. 2d 496, 500-1. There it was said that the findings of the trial court in admiralty will be disturbed on appeal if they are clearly against *"the weight"* of the evidence; that the *"whole evidence"* must be weighed on appeal; that it is the duty of the appellate court to make independent *"examination, thought, and judgment";* and that the presumption that the findings of the trial court are correct is *"of lesser weight and more easily may be rebutted",* where, as here, a substantial part of the evidence before the trial court consists in deposition testimony. There was very recent confirmation of the case in *The Wildwood,* C.C.A.Wash. 1943, 133 F. 2d 765, 768.

An application of these principles, it is sincerely urged, will bring the conviction that the judgment herein should be reversed.

CONCLUSION.

For the several reasons herein appearing, it is therefore respectfully submitted that the decree appealed from should be reversed.

Dated, Stockton, California,
August 29, 1944.

DARRAH & ELLIS,
GUARD C. DARRAH,
AGLER B. ELLIS,
SINGLE, BRYANT, COOK AND HERRINGTON,
Proctors for Appellant.